

Applying the principle enunciated in *Brown v. Draper, supra*, that a statutory tenant is entitled to say that his rights under the Acts have not been affected by an order for recovery of possession against his licensee on the ground that such an order was made without jurisdiction it further follows in my opinion that the Court has no jurisdiction to make an order for recovery of possession against the second defendant who claims to be in occupation as the licensee of the first defendant unless the first defendant is properly before the Court and an order is made against him as well.

In any event, on the evidence led in this case I find as a fact that the first defendant's absence has not been sufficiently prolonged to compel the inference of a cesser of possession or occupation but if it were so I also find as a fact that the first defendant has both the *animus possidendi* and the *corpus possessionis* to establish that he has possession in fact of the said premises in that he had the *de facto* intention to return after his absence and he had clothed that inward intention by leaving his furniture in the said premises and by installing in the premises firstly one Khurshid Gadrawala and after him the second defendant with the status of a licensee and with the function of preserving the said premises for his ultimate return.

For these reasons there must be judgment for the second defendant with costs.

Judgment for 2nd defendant.

Solicitors: *Drew & Napier; Donaldson & Burkinshaw.*

**Re ADAM AMAN;
HOESIN BIN GHANI v. PUBLIC PROSECUTOR**

[A.Cr.J. (Rigby J.) February 24, 1958]

[Penang — Criminal Appeal No. 49 of 1957 and
Criminal Revision No. 32 of 1957]

Criminal Law and Procedure — Witness — Discretion of Court to call — Test to be applied — Witness called after close of prosecution case and after accused had elected not to call evidence — Criminal Procedure Code (Cap.21), s.451.

In this case the appellant had been charged with offences contrary to sections 131(1)(g) and 131(1)(d) of the Customs Ordinance, 1952 in relation to 150,060 Indonesian rupiahs. The appellant was called for his defence and thereupon elected to call no evidence. His counsel then submitted that no case had been made out against the appellant on the ground that there was no evidence that the notes were "legal tender" in Indonesia, within the meaning of section 25 of the Exchange Control Ordinance, 1953. The learned President then adjourned the Court. Subsequently he decided in the interests of justice to call a bank official to give evidence as to the notes. The bank official was called and opportunity was given to the appellant's counsel to cross examine him. After hearing his evidence the learned President convicted the appellant. The main ground of appeal was that the learned President wrongly exercised his discretion at the conclusion of the evidence by calling a witness on a material point which could and should have been foreseen by the prosecution.

Held: it could not be said that the learned President had wrongly exercised his discretion in this case and that the calling of the evidence occasioned a miscarriage of justice and therefore the appeal must be dismissed.

The test to be applied by the Court before exercising its discretion as to whether or not to call additional evidence under section 451 of the Criminal Procedure Code (Cap.21) is "Would it result in an injustice being done to the accused?" In resolving that question technical points ought not to prevail where there is a possibility of their being remedied without doing any injustice.

Cases referred to:—

- (1) *Ajami v. Comptroller of Customs*, (1954) 1 W.L.R. 1406.
- (2) *Jacob v. Public Prosecutor*, (1948-49) M.L.J. Supp. 20.
- (3) *Kee Seng Nee v. R.*, (1949) M.L.J. 210.
- (4) *Balfour v. Public Prosecutor*, (1949) M.L.J. Supp. 8.
- (5) *R. v. Day*, (1940) 1 All E.R. 402; 27 Cr.App.R. 168.
- (6) *R. v. Bakar bin Sahat*, (1951) M.L.J. 202.
- (7) *Loke Poh Siang v. Public Prosecutor*, (1957) M.L.J. 107.
- (8) *R. v. McKenna*, (1956) Crim.L.R. 327; 40 Cr.App.R. 65.
- (9) *R. v. Jackson*, 14 Cr.App.R. 41.
- (10) *Cher Tiam Sang v. Public Prosecutor*, Raub — Cr.App.6/53 — unreported.

- (11) *R. v. Sullivan*, (1923) 1 K.B. 47; 16 Cr.App.R. 121.
- (12) *R. v. Remnant*, (1807), R. & R. 136.
- (13) *Middleton v. Rowlett*, (1954) 2 All E.R. 277.
- (14) *R. v. Browne*, 29 Cr.App.R. 106.
- (15) *R. v. Owen* (1952) 1 All E.R. 1040.
- (16) *R. v. Sanderson*, (1953) 1 All E.R. 485.
- (17) *R. v. Joseph Wilson*, 41 Cr.App.R. 226.
- (18) *In the Matter of Ananda Chunda Singh v. Basu Mudh*, I.L.R. 24 Cal. 167.

MAGISTRATE'S APPEAL.

R. D. Hume (*Lee Thean-chu* with him) for the appellant and petitioner.

H. S. Ong (Federal Counsel) for the respondent.

Cur. Adv. Vult.

Rigby, J.:—The appellant in this case was convicted by the learned President of the Sessions Court, sitting at Georgetown, Penang, on two charges preferred against him of offences contrary to the provisions of section 131(1)(g) and 131(1)(d) of the Customs Ordinance, 1952. Upon conviction he was fined the sum of \$5,000 on the 1st charge and \$1 on the 2nd charge. The learned President, as, indeed, he was bound to do consequent upon the convictions, further ordered the forfeiture of the 150,000 Indonesian rupiahs and the sampan used in the commission of the offences.

The appellant now appeals against the convictions and sentences and the order of forfeiture made in respect of the 150,000 rupiahs. There is also a petition by one Adam Aman, the Indonesian registered owner of the sampan, against the order of forfeiture of the sampan.

The particulars of the charges preferred against the appellant were as follows:—

- (1) "That you at about 9.45 p.m. on 8th September, 1957, on board sampan Sl.No.407 in Penang Harbour, Penang, were knowingly concerned in an attempt to export prohibited goods, to wit, Indonesian currency

to the total face value of 150,000 rupiahs, such goods being goods the export of which is prohibited, except with the permission of the Controller of Foreign Exchange, under section 25(1) of the Exchange Control Ordinance, 1953, and thereby committed an offence under section 131(1)(g) of the Customs Ordinance, 1952, and punishable under section 131(1)(iii) of the Customs Ordinance, 1952.

(2) "That you, Hoesin bin Ghani, taikong of Sumatran sampan Sl. No.407 at about 9.45 p.m. on 8th September, 1957, in Penang Harbour, Penang, did knowingly harbour uncustomed goods, to wit, Indonesian currency to the total face value of 150,000 rupiahs on board the said sampan and thereby committed an offence under section 131(1)(d) of the Customs Ordinance, 1952, and punishable under section 131(1)(ii) of the Customs Ordinance, 1952."

It was agreed by Counsel at the outset of this appeal that the use of the words "uncustomed goods" in the 2nd charge was incorrect and that what, in fact, was meant was "prohibited goods". Mr. Hume, for the appellant, stated that he took no point on the error made.

The facts of the case were virtually undisputed and are briefly as follows:—

At about 9.45 p.m. on the 8th September, 1957, Customs Revenue Officers in the vicinity of the Malay Street Ghaut, Penang, were attracted by the sound of a motor sampan. They duly hailed and boarded the sampan. The port clearance papers dated the 7th September, 1957, and issued by the Penang Customs authorities under section 35 of the Customs Ordinance, stated that the vessel was sailing under Indonesian colours bound for an Indonesian port, and gave the date of departure as "7.9.57 at p.m.". The occupants of the sampan consisted of the taikong or master, who is, in fact, the present appellant, and a crew of four. Apart from the taikong and crew of four the vessel contained a quantity of cloth and other things, all of which were found to be covered by export permits. The taikong and crew were asked if they had any Indonesian currency and they replied in the negative. A search of the vessel revealed two tins concealed in part of the bow of the ship. The tins were found to contain what appeared to be Indonesian currency notes. The taikong at first denied both ownership and knowledge of the notes, but

subsequently admitted that the money was his and that the tins contained 150,000 rupiahs Indonesian currency. This was checked and found to be exactly correct.

On these facts the master and crew were jointly charged with being knowingly concerned in an attempt to export prohibited goods, to wit, Indonesian currency to the total value of 150,000 rupiahs, such goods being goods the export of which is prohibited, except with the permission of the Controller of Foreign Exchange, under section 25(1) of the Exchange Control Ordinance. A further charge was preferred against the appellant of knowingly harbouring uncustomed (prohibited) goods, to wit, the said Indonesian currency notes.

At the conclusion of the case for the prosecution Counsel, appearing on behalf of all five accused, submitted that there was no case to answer on the ground that the prosecution had failed to prove knowledge and conscious possession of the money by all or any of the accused. The learned President accepted that submission as regards the four members of the crew and acquitted and discharged them, but he called upon the appellant for his defence. Thereupon the appellant, as he was perfectly entitled to do, elected to call no evidence, and his Counsel, again as he was perfectly entitled to do, submitted that no case had been made out against the appellant on the ground that there was no evidence that these notes were, in fact, genuine Indonesian currency and/or that they were legal currency at the time of the offence. The learned President then adjourned the case for delivery of judgment on a date to be notified to the parties. Six days later, the 9th October, 1957,—the parties having been duly informed—the Court reassembled. The accused was present, together with his Counsel, and the prosecution was represented as before. What then took place is best described by reading the note made in his record by the learned President. It reads as follows:—

“After case for prosecution, Counsel for both accused and the prosecution summed up. Defence called

A upon—defendant elected not to make any statement. The Counsel for accused again addressed Court and said Notes not proved legal tender.

Prosecution witness Mr. Miller's evidence—accused's admission of notes as money and as 150,000 Rupiahs Indonesian currency.

B In the interests of justice and to enable Court to arrive at a proper decision Court calls a bank official. Using discretion under section 451 Criminal Procedure Code.

C Mr. Lee Thean-Chu objects to evidence being called after defence being closed.

Objection over-ruled.”

The witness was then called. He gave evidence that he was an employee of the Chartered Bank; that his Bank was registered as a dealer for foreign currency; that he had been a cashier in the Bank for the last 12 years; that he was familiar with Indonesian currency notes; that the notes then in evidence were, in his opinion, genuine Indonesian currency notes; that at present his Bank did not accept Indonesian currency notes because of the lack of demand, but that if they were to accept them he would accept the notes produced in evidence; and that the current value of 1 rupiah was equal to about 7 cents local currency. The learned President then convicted the appellant of the offences as charged and passed the sentences and made the orders of forfeiture to which I have referred.

G The appellant's first ground of appeal was that there was no evidence that the notes seized were notes, the export of which was prohibited within the meaning of the Ordinance.

H “Prohibited goods” are defined under section 2 of the Ordinance to mean “goods the import or export of which is prohibited, either absolutely or conditionally by an order under section 30 of this Ordinance or by any other written law for the time being in force in the Federation.” Having regard to the words “by any other written law” it becomes necessary to turn to section 25 of the Exchange Control Ordinance, 1953. That section enacts:—

"25. (1) Except with the permission of the Controller no person shall export from the Federation to any place outside Malaya —

(a) any notes of a class which are or have at any time been legal tender in the United Kingdom or any part of the United Kingdom or in any other territory;"

In order that the prosecution should succeed in its charge against the appellant of attempting to export prohibited goods it was, therefore, necessary for it to prove affirmatively as an essential part of its case that the notes seized were "notes of a class which are or have at any time been legal tender in the United Kingdom or in any other territory". It might most reasonably appear to the ordinary lay mind that the production of these notes which, on the face of them, appear to be Indonesian currency notes, was certainly sufficiently *prima facie* evidence that they were notes of a class "which are or have at any time been legal tender in the United Kingdom.....or in any other territory" including, of course, Indonesia itself. But the fact that expert evidence is required in those cases to be called to prove that the notes are legal tender is, I think, rendered clear beyond doubt by the decision of the Privy Council in the Nigerian case of *Ajami v. Comptroller of Customs*.⁽¹⁾ I am, therefore, satisfied that without the evidence of the Bank official the prosecution had failed to prove the charges preferred against the appellant and if the learned President was not justified, in the exercise of his discretion, in calling this witness, of his own motion, this appeal should be allowed.

I turn then to the substantial point in this appeal, namely, the submission of the appellant that the learned President wrongly exercised his discretion at the conclusion of the evidence and after he had adjourned the case for consideration of his judgment by calling, of his own motion, a witness on a material point which could and should have been foreseen by the prosecution. The point, to my mind, is one of such practical interest and importance that I propose, as briefly as possible, to consider a

A number of relevant authorities, both Malayan and English.

As the learned President himself stated, the power under which he exercised his discretion in calling the witness is expressly contained in section 451 of the Settlement Criminal Procedure Code (section 425 of the Federated Malay States Criminal Procedure Code, and section 540 of the Indian Criminal Procedure Code), which reads as follows:—

"451. Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness or examine any person in attendance, though not summoned, as a witness or recall and re-examine any person already examined and the Court shall summon and examine or recall and re-examine any such person, if his evidence appears to it essential to the just decision of the case."

The first relevant case that I have been able to find is that of *Jacob v. Public Prosecutor*.⁽²⁾ In that case the appellant appealed on the ground, *inter alia*, that he had not been afforded an opportunity to rebut the evidence of a witness called by the Court, such witness having been called by the Court after the close of the case for the defence. Callow, J. allowed the appeal on the very good ground that although the Magistrate had a discretion under section 425 of the Federated Malay States Criminal Procedure Code in calling a witness after the close of the case for the defence, the defence must be given an opportunity to cross-examine such witness, and to call evidence in rebuttal. As to the actual provisions of the section itself Callow, J., after stating that he could find no local case to guide him and after having considered a number of textbooks and reports, both English and Indian, came to the conclusion that the powers conferred under this section and their exercise are wider than the corresponding powers in English Law. He stated:—

"After consideration of the authorities I have cited, others I have studied, and from the general circumstances of the case, I distinguish the law in this country from that in England by holding that whereas in England the Court should not call a witness after the close of the defence unless something has arisen *ex improviso*, which no human ingenuity could foresee, on

the part of the accused; in Malaya the power so vested in the Court by virtue of section 425 of the Criminal Procedure Code may be exercised after the close of the defence if the further evidence appears essential to the just determination of the case."

The next case of *Kee Seng Nee v. Rex*⁽³⁾ is, I think, of little assistance for the purpose of considering the principle involved. In that case the learned Magistrate had recalled certain prosecution witnesses after Counsel for the defence had addressed the Court. In allowing the appeal against conviction on the ground that the course adopted had occasioned a miscarriage of justice Murray-Aynsley, C.J. indicated that the Magistrate had presumably resolved certain factual doubts he entertained at the conclusion of the evidence by recalling certain prosecution witnesses, as a result of which, of course, he convicted the accused. The issue now under consideration before me is not one of a Magistrate exercising his discretion under this section by recalling a witness to resolve doubts in his mind arising from a simple conflict of evidence between the prosecution and the defence but whether or not a Magistrate is justified in the exercise of his discretion in calling a witness to prove a technical, although an obviously essential, point overlooked in the presentation of the case for the prosecution.

In the case of *Balfour v. Public Prosecutor*,⁽⁴⁾ a witness as to fact, who could and should have been called by the prosecution, was not so called. The omission was noted by the trial Judge after the conclusion of the defence evidence but before the speeches of Counsel and he directed that the witness be called to give evidence. Whilst dismissing the appeal against conviction the Court of Appeal criticised the course adopted by the trial Judge in the following words:—

"It is correct that section 425 of the Criminal Procedure Code authorises the Court to call an additional witness at any stage and that the Court may, in special circumstances, properly do so of its own motion but where a case is conducted by Counsel and more especially where, as here, a preliminary enquiry has been held before a committing Magistrate, this power should be

A exercised only in rare cases as, for instance, where one side has raised at the trial a point which the other side could not have foreseen, *Rex v. Day*⁽⁵⁾. In the opinion of this Court the calling of Hanifa by the trial Judge, though not illegal, was a wrong exercise of discretion and his evidence ought to be excluded."

B It is, of course, to be noted in this case that the witness was called not simply at the close of the case for the prosecution but after the defence itself had been concluded.

C In *Rex v. Bakar bin Sahat*⁽⁶⁾ the learned Magistrate, after the close of the case for the defence, had recalled a prosecution witness to rebut an allegation made by the accused. In exercising his powers of revision on other grounds Spenser Wilkinson, J. referred to the cases of *Kee Seng Nee* and *Balfour*, which I have already mentioned, and quoted a passage from Kuala Lumpur Criminal Appeal No. 47 of 1949 (unreported), which is as follows:—

E "Although that section empowers a Court to call evidence 'at any time' there is a clear and distinct limitation upon this discretionary power. I have had occasion before to point out that although a section of the Code may give the Court a very wide discretion, such discretion must be exercised subject to such well-known legal principles as are applicable in each case. F It has been laid down by the Court of Criminal Appeal in England that after the defence has been closed no further evidence should be called either by the Court or by either party unless the cause for such evidence is one which no human ingenuity could have foreseen. (*Rex v. Day*⁽⁵⁾.)"

G He concluded with the warning that Presidents and Magistrates would be well advised "to exercise the power under section 451 of the Criminal Procedure Code of calling or recalling witnesses with caution and should hesitate to do so after the close of the defence without strong reasons". I would, indeed, respectfully agree and associate myself with that warning.

I In *Loke Poh Siang v. Public Prosecutor*⁽⁷⁾ the appellant was charged with that he, being a duly licensed rubber dealer, contravened certain sections of the Kedah Rubber Supervision Enactment. At the close of the case for the prosecution Counsel for the defence submitted that there was no case to answer since there

was no evidence that the appellant was, in fact, a duly licensed rubber dealer, an essential ingredient of the charge. The learned Magistrate, in what he deemed to be the proper exercise of his discretion under section 425 of the Federated Malay States Criminal Procedure Code, decided to call as a witness the clerk-in-charge of the Rubber Licensing Board to give evidence as to whether or not the appellant was a licensed rubber dealer, and he adjourned for this purpose. On the adjournment the clerk was called, opportunity was given to the defence to cross-examine, the defence was heard and the appellant duly convicted and fined. A passage in the judgment of Hill, J., dismissing the subsequent appeal against conviction, appears to me so directly pertinent that I quote it at length:—

“Mr. Lim Cheng Poh for the appellant argued that as no *prima facie* case had been made out against his client when the prosecution case was closed he was entitled to be acquitted in accordance with section 173(f) of the Criminal Procedure Code and that to invoke section 425 of that Code as was done was improper. In support of his argument Mr. Lim Cheng Poh referred me to the decision in *R. v. Day*⁽⁵⁾, and to the *dicta* of Spenser Wilkinson, J. in *R. v. Bakar*⁽⁶⁾.

R. v. Day⁽⁵⁾ and the other decisions therein referred to deal exclusively with the question of witnesses being called after the defence has been given. A very different situation to that arising in the trial under review and the question for consideration is whether the principles laid down in *R. v. Day*⁽⁵⁾ should be applied.

Mr. Sheldon referred me to two decisions of the Court of Criminal Appeal in *R. v. McKenna*⁽⁸⁾ and *R. v. Jackson*⁽⁹⁾, and an unreported decision by Mathew, C.J. in Raub Criminal Appeal No. 6 of 1953, *Cher Tiam Sang v. Public Prosecutor*⁽¹⁰⁾.

These three decisions remove any doubt there may be about the absolute discretion a Court enjoys in recalling or calling a witness after the close of the prosecution case to rectify an omission in the prosecution evidence. Indeed, the generally accepted view in my experience has been that it is the duty of a Magistrate to call a witness in such circumstances.

Whenever it is at all likely by adopting such a course that the defence is being taken by surprise or placed in any real difficulty an adequate adjournment should, of course, be granted.

I cannot agree that section 173(f) of the Criminal Procedure Code can be construed as in any way fettering

A a Magistrate in the exercise of this discretion even without taking into consideration the specific authority conveyed by miscellaneous section 425 of the Code.

B I hold therefore in this appeal that the President exercised his discretion judicially and properly and that the appellant was subsequently rightly convicted.”

C I am under the impression that the unreported decision of Mathew, C.J., referred to by Hill, J., was an appeal from a conviction in the Magistrate's Court for an offence under section 304A of the Penal Code of negligently causing death in the driving of a motor car. At the conclusion of the case for the prosecution before the Magistrate the defence submitted that there was no case to answer on the ground that there was no evidence of identification connecting the deceased person with the name of the deceased person as appearing in the body of the charge. The learned Magistrate, notwithstanding the submission of the defence, allowed the necessary evidence of identification then to be called and subsequently proceeded to the conviction of the accused. The accused appealed on the ground that the Magistrate had wrongly exercised his discretion in calling a witness after the case for the prosecution had been concluded. D Mathew, C.J. dismissed the appeal.

E In the English case of *McKenna*⁽⁸⁾ the accused was charged with the export of certain articles in contravention of Article 2 of the Export of Goods (Control) (Consolidation) Order, 1952. The articles in question included steam rollers, lorries, traction engines and concrete mixers. In order to be within the terms of the Order the articles had to be “goods subjected to any process of manufacture, wholly or mainly of iron or steel”. At the conclusion of the case for the prosecution it was submitted on behalf of the defence that there was no case to answer on the ground that there was evidence that any of the articles were made wholly or mainly of iron or steel. The Commissioner trying the case thereupon recalled one of the prosecution witnesses in order to give evidence of the materials of which the articles were made and, after the witness had given evidence, ruled that there was a case to go to the jury. On

appeal, it was argued that the Commissioner was not entitled to recall a prosecution witness after the close of the case for the prosecution. In rejecting that argument and dismissing the appeal the Court, in the course of its judgment, said:—

“It is, in the opinion of this Court, sufficient to say that the course taken by the learned Commissioner is one which has been recognised as being a perfectly proper course for many years. It is only necessary to refer to *Sullivan*,⁽¹¹⁾ where it is at once to be seen that a Judge, in the circumstances in which the learned Commissioner acted in this case, has complete discretion whether a witness shall be recalled, and this Court will not interfere with the exercise of his discretion unless it appears that thereby an injustice has resulted. It is quite obvious that there was no injustice in this case.”

In *R. v. Remnant*⁽¹²⁾ the prisoner was accused of stealing some Bank notes, the property of one J.N. At the close of the case for the prosecution the prisoner's Counsel objected that there was no evidence that the notes were ever in the actual possession of J.N. and that they could not constructively be so at the time the larceny was committed. The Judge wished to make further inquiries about the notes but on the objection being taken that Counsel for the prosecution had closed his case he forbore to do so. The prisoner was convicted. On appeal it was held that it would have been competent and proper for the Judge, if he had thought fit, to have made any further inquiry respecting the property after the close of the case for the prosecution.

The effect of these cases make it clear beyond doubt that both under Malayan and English Law a Court has a complete discretion to call or recall a witness after the prosecution has closed its case and a submission has been made that there is no case to answer, and an appellate Court will not interfere with the exercise of that discretion unless it appears that thereby an injustice has resulted.

An instance where the Court refused to allow an essential prosecution witness to be called or recalled on what was, in effect, a technical but essential part of the case for the prosecution

A after the defence had submitted that there was no case to answer, is illustrated in the English case of *Middleton v. Rowlett*.⁽¹³⁾ In that case Rowlett had been charged with dangerous driving. At the close of the case for the prosecution the defence submitted that there was no evidence that Rowlett was, in fact, the driver of the car. The prosecution asked for leave to recall a witness to prove the driver's identity. The Justices refused. The prosecution appealed by way of case stated. On appeal the Divisional Court consisting of Lord Goddard, C.J. and Hilbery and Donovan, JJ. dismissed the appeal holding that it was a matter of discretion and they did not consider that the Justices were bound to exercise their discretion in allowing such evidence to be given. Goddard, C.J. expressly stated, however, that he thought that what had happened was regrettable and he did not think that the Court would have interfered for a moment if the Justices had exercised their discretion the other way. It is open to doubt whether the decision in *Middleton v. Rowlett*⁽¹³⁾ ought to be followed in Malaya having regard to the imperative provisions of the latter part of section 451—namely, that the Court shall summon and examine any person if his evidence appears to it essential to the just decision of the case—and bearing in mind the view expressed by Hill, J. in *Loke Poh Siang v. Public Prosecutor*,⁽⁷⁾ with which I respectfully agree, that it is the duty of a Magistrate to call or recall a witness after the close of the prosecution case to rectify an omission in the prosecution evidence.

But what is the position where such evidence is called by the Court, in the exercise of its discretion, after the defence has been concluded and final addresses made? I have quoted the *dicta* of the Court of Appeal in the case of *Balfour v. Public Prosecutor*⁽⁴⁾ where, relying upon the English authority of *Rex v. Day*,⁽⁵⁾ the Court expressed the view that the discretionary power conferred upon the Court under section 425 (Federated Malay States Criminal Procedure Code) should only be exercised in rare cases as,

for instance, where one side has raised at the trial a point which the other side could not have foreseen. I have been unable to find any authority decided in this country in which this precise point has been decided. The English case of *Jackson*⁽⁹⁾ appears to me to be of some relevance. In that case the accused was charged on two counts of receiving stolen property well knowing that it was stolen. The thief himself gave evidence for the prosecution that he had stolen jewellery and a Gillette razor and parted with this property to the accused. The only property found on the accused was the razor. Notice having been given a previous conviction for receiving stolen property was proved against the accused. At the conclusion of the case for the prosecution the defence submitted that there was no evidence as to the ownership of the razor as the sole evidence was that of the thief who was not corroborated. Two witnesses who had been summoned by the prosecution to give evidence had attended at the Court but had subsequently left the Court without giving evidence through no fault of those responsible for the prosecution, but through a misunderstanding. The trial Judge ruled that there was a case to answer. The defence was called and the final speeches made. The trial Judge then adjourned the case in order that the two witnesses might be called to give evidence. They gave evidence and the accused was duly convicted. On appeal the point was taken that the trial Judge had acted wrongly in adjourning the case after the final speeches had been heard so that the further evidence might be given for the Crown. In dismissing this ground of appeal, the then Lord Chief Justice, Lord Reading, delivering the judgment of the Court said:—

“The sole question for us is whether he (the Recorder) did anything contrary to law or anything that was unjust to the prisoner by taking this course. On the adjournment the Recorder afforded the defence every opportunity to put forward to the jury any views upon the fresh evidence. Every care was taken that the prisoner should not be prejudiced. The point taken by Counsel for the defence was merely technical. Technical points ought not to prevail where there is a possibility of their being remedied without doing any injustice. The sole point is whether these witnesses should have been called. In our view the learned Recorder acted quite rightly in adjourning the case and calling them.”

It is, of course, true that that case differs from the one now under consideration in that the necessary witnesses had, in fact, been summoned by the prosecution and had left the Court through no fault of the prosecution but through

A a misunderstanding, whereas in the present case it had apparently not occurred to the prosecution that expert evidence that the notes were, in fact, legal tender was an essential part of their case. But the test to be applied by the Court before exercising its discretion as to whether or not to call such additional evidence would remain the same, namely, would it result in an injustice being done to the accused? In resolving that question the words of Lord Reading, C.J. that “technical points ought not to prevail where there is a possibility of their being remedied without doing any injustice” seem to me to be of crucial importance and practical assistance.

Lastly, there is a line of English cases, to which I need only briefly refer, from which it is clear that under English law once the summing-up has been concluded by the Judge no additional evidence may be called and if such evidence is called the appellate Court will set aside any subsequent conviction. In the case of *Browne*⁽¹⁴⁾ the trial Judge, after his summing-up, and at the repeated request of the jury, called certain medical evidence which affected the accused. The jury convicted the accused. On appeal the conviction was quashed in view of the irregularity of a witness being called by the Judge at that stage of the trial, coupled with the fact that the summing-up was inadequate. Cassells, J., delivering the judgment of the Court, in the course of his judgment, said, at page 111:—

“A little regularity about the conduct of criminal proceedings and trial by indictment is not unbecoming. It is not right to regard the procedure as being in the nature of a committee of inquiry, where one member of the committee after another gets up and makes various suggestions, and at various intervals people are called in to give evidence. There is a stage for the evidence of the prosecution. There is a stage for the evidence of the defence. Then there is a stage for the summing-up, and it is wrong, as has been laid down by this Court before now, for evidence to be called at the end of a case when all the evidence available has been provided for the consideration of the Court. It is wrong for evidence then to be put before the Court, unless it comes within certain well-recognised principles.”

In the case of *R. v. Owen*,⁽¹⁵⁾ after the jury had retired, the Judge, at the request of the jury, allowed a further witness to be called. In doing so, as is apparent from his subsequent certificate granting leave to appeal, he was of the opinion that the question to which the jury required an answer was of vital relevance and could have been proved by the prosecution as

part of their case, but he was of the opinion that — and I quote the words used:—

“The interests of justice demanded the evidence and that the defendant would not be unjustly prejudiced if I allowed the evidence.....”

The sole ground of appeal was that evidence had wrongly been allowed to be given in consequence of a question by the jury after they had retired to consider their verdict. In allowing the appeal and quashing the conviction Lord Goddard, C.J., delivering the judgment of the Court, said, at page 1042:—

“We do not desire in any way to limit the discretion of a Judge to admit evidence for the prosecution after the case for the defence has been closed where it becomes necessary to rebut matters which have been raised for the first time by the defence.....It must be a matter for the discretion of the Judge, which should be applied with caution, but it appears to us that it is quite another thing to say that, after the whole case is concluded and it remains only for the jury to return their verdict, it is right to allow further evidence to be given to clear up some matter which is troubling the jury.”

Owen's case⁽¹⁵⁾ was distinguished in *R. v. Sanderson*.⁽¹⁶⁾ In that case a defence witness arrived when the summing-up was almost completed. After the conclusion of his summing-up the learned trial Judge, acceding to the request of the defence, allowed the witness to give evidence and then delivered what was, in effect, a brief supplementary summing-up. In commenting on the course taken the Court of Criminal Appeal held that while it was not a course which it was desirable should be taken often, the witness having been called for the defence and not the prosecution, there was no objection to what had been done.

However, in the case of *Joseph Wilson*⁽¹⁷⁾ the Court of Criminal Appeal again re-affirmed the principle laid down in *Owen's case*⁽¹⁵⁾ that once a summing-up had been given no further evidence should be allowed. Although stating that the result of the appeal was that an obviously guilty person who had several previous convictions was now released because of an unfortunate mistake, the appellate Court declined to apply the proviso to section 4 of the Criminal Appeal Act, 1907, that there had been no miscarriage of justice, on the ground that if it did so it would, in effect, be overruling the principle laid down in *Owen's case*.⁽¹⁵⁾ It did, however, express the view that if there has been power to order a new trial this would obviously have been

A a case for so doing. I would only add the comment that this Court, of course, unlike the Court of Criminal Appeal in England, has specific power to order a new trial.

B I have referred to these English cases of *Browne*,⁽¹⁴⁾ *Owen*,⁽¹⁵⁾ *Sanderson*⁽¹⁶⁾ and *Joseph Wilson*⁽¹⁷⁾ partly because they are of some interest and possible importance having regard to the introduction of the jury system in Malaya, but primarily because Mr. Hume contended that the retirement of the learned President to consider his judgment after having heard all the evidence in the case was analogous to the position of the jury called upon to give their verdict after the Judge had summed up, and the English cases were, therefore, directly relevant in support of the proposition that it was a wrongful exercise of the Court's discretion to call, or allow to be called, evidence at that stage. I would have assented entirely to that proposition were it not for the wording of section 451 itself. The section, as I have already said, is identical with—and, in fact, copied from—section 540 of the Indian Criminal Procedure Code. The first part of the section is discretionary and empowers the Court at any stage of any trial to summon any person as a witness; the latter part is mandatory and the Court shall summon and examine any person “if his evidence appears to it essential to the just decision of the case”. *Sohoni* in his commentary on the Indian Code of Criminal Procedure, 14th edition, page 1072 states:—

C “A magistrate is strictly within his rights under this section in receiving fresh evidence after evidence of both sides have been taken and the case adjourned for judgment, inasmuch as the case was still a pending case when such evidence was taken.”

D That comment is expressly supported by the Indian case of *In the Matter of Ananda Chunda Singh v. Basu Mudh*.⁽¹⁸⁾ The procedure followed by the Magistrate in that case was, indeed, identical with the course taken by the learned President in this case. After the defence had closed the Magistrate adjourned the case to the next date for judgment. On that day he then called a further witness, after which he delivered judgment resulting in the conviction of the accused. The conviction was quashed by the Sessions Judge, who commented—and I quote his comments:—

E “.....After taking all the evidence on both sides and adjourning the case for judgment, as if the evidence was closed, he (the Magistrate) suddenly supplemented the evidence by calling a witness, who is really

one of the most important prosecution witnesses, and then delivered judgment. It cannot be said on these facts that the accused has had an impartial trial, and on this ground alone the trial should in my opinion be set aside."

On a reference to the High Court that Court, in reversing the decision of the Sessions Judge, stated:—

"It was perhaps irregular on the part of..... the Magistrate, in calling for and examining a witness after the evidence on both sides had been taken and the case adjourned for judgment, but it does not appear to us that the accused was in any way prejudiced by the action of the Magistrate, and, indeed, it may well be said that he (the Magistrate) was strictly within his rights under section 540 of the Code, for the case was still pending, when the fresh evidence was taken."

I would respectfully agree with the view expressed by Callow, J. in *Jacob v. Public Prosecutor*,⁽²⁾ to which I have already referred, that the powers conferred upon the Court under this section are wider—much wider, I think—than the corresponding powers in English law. The Court is expressly vested with the statutory power at any time before judgment to call or recall a witness if his evidence appears to it essential to the just decision of the case. The sole test as to whether he has properly exercised his discretion lies in the answer to those last few words, namely, was such evidence essential to the just decision of the case or, put in another way, did the calling of such evidence occasion a miscarriage of justice? It seems to me that the answer to that question must logically be that every case must be considered on its own merits and in relation to its own facts. I would venture to express the opinion that it is not sufficient for the appellate Court to say that the Magistrate has wrongly exercised his discretion in calling further evidence merely because the appellate Court itself would not similarly have exercised the same discretion in the same way.

Applying those principles to the facts of this case, I, myself, following well-recognised and long established principles of English practice and procedure, would certainly not have been prepared to exercise my discretion by calling the evidence of the expert at this eleventh hour in the case after the evidence had been concluded. But in view of the mandatory provisions of the latter part of the section it may well be that I would have been wrong in not so doing. But, to my mind, the crucial question to be answered

A is; can it be said that the learned President wrongly exercised his discretion? Was such evidence as he called essential to the just decision of the case? I find myself quite unable to say that it was a wrong exercise of his discretion or that the calling of such evidence occasioned a miscarriage of justice. The notes had been found concealed in the bow of the vessel. The appellant belatedly admitted that they were his and that there were 150,000 rupiahs Indonesian currency. It was necessary to ascertain whether or not the notes were "legal tender in the United Kingdom.....or in any other territory." Such evidence, although essential, was clearly of a highly technical nature and had been overlooked by the prosecution. However, it appeared to the learned President to be essential to the just decision of the case and he, of his own motion, called a witness who could depose to this fact. The appellant was given an opportunity to cross-examine that witness, and did, in fact, so cross-examine him. He was then given an opportunity, through his Counsel, to say anything further—which would, of course, enable him to say, if he so thought fit, that he wished to call rebutting evidence. How can it then be said that the learned President, in exercising the discretion vested in him by statute, wrongly exercised that discretion, or that by so exercising it a miscarriage of justice was occasioned thereby? On the face of it, it may well be thought that it would have been a miscarriage of justice if a highly technical point of this nature had been allowed to prevail and the learned President had not complied with the imperative duty imposed on the Court under the latter part of the section in calling a witness, the evidence of whom appeared to be essential to the just decision of the case.

For these reasons I am of the opinion that this appeal, and the accompanying petition for revision, must be dismissed. I would only add that the question of the interpretation of this section is clearly one of considerable practical interest and importance and I, for my part, would welcome an application by either party to these proceedings, under section 34 of the Courts Ordinance, to issue a certificate that the point of law involved in this matter is one which it is desirable in the public interest to have determined by the Court of Appeal.

Appeal dismissed.

Solicitor for appellant and petitioner: *Lee Thean-chu.*